United Nations A/63/325

General Assembly

Distr.: General
25 August 2008

Original: English

Sixty-third session
Item 66 of the provisional agenda*
Right of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly, in accordance with General Assembly resolution 62/145 and Commission on Human Rights resolution 2005/2, the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination.

* A/63/150 and Corr.1.

08-48981 (E) 230908

Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Summary

The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination was established in July 2005 pursuant to Commission on Human Rights resolution 2005/2. It is mandated, inter alia, to monitor mercenaries and mercenary-related activities in all their forms and manifestations in different parts of the world and to study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights.

From March 2007 to April 2008 Mr. José L. Gómez del Prado (Spain) was the Chairperson-Rapporteur of the Working Group. From April 2008, the Working Group was headed by its Chairperson-Rapporteur, Mr. Alexander Nikitin (Russian Federation), and its members were Ms. Najat Al-Hajjaji (Libyan Arab Jamahiriya), Ms. Amada Benavides de Pérez (Colombia) and Ms. Shaista Shameem (Fiji).

The present report is prepared in accordance with the terms of Commission on Human Rights resolution 2005/2, in which the Commission on Human Rights requested the Working Group to report annually to the General Assembly, and with the terms of General Assembly resolution 62/145.

Section I of the report introduces its contents, section II outlines the activities undertaken by the Working Group, including its third session, held in April 2008, and summarizes the conclusions of the field mission it conducted in the United Kingdom of Great Britain and Northern Ireland. It refers to actions taken under the Working Group communications procedures and notes consultations held with representatives of Governments, intergovernmental and non-governmental organizations and academia.

Section III contains an overview of relevant international developments regarding the issue of mercenaries, mercenary-related activities and the activities of private military and security companies.

Section IV depicts the draft principles, guidelines and criteria elaborated by the Working Group in view of the possible development of national and international regulation mechanisms to address the activities of private military and security companies. This is the first step in presenting concrete proposals on possible complementary and new standards aimed at filling existing gaps, as well as general guidelines or basic principles encouraging the further protection of human rights, in particular the right of peoples to self-determination, while facing current and emergent threats posed by mercenaries or mercenary-related activities and private military and security companies, as mandated by the Human Rights Council.

Section V addresses the Working Group's future activities, and section VI contains its conclusions and recommendations.

Contents

		Page
I.	Introduction	4
II.	Activities of the Working Group	4
	A. Third session of the Working Group	4
	B. Field missions	5
	1. Mission to the United Kingdom of Great Britain and Northern Ireland	5
	2. Other missions in preparation	5
	C. Regional consultation	6
	D. Communications	6
	E. Other activities	6
III.	International and regional developments	7
IV.	Elaborated principles, guidelines and criteria for national and international regulation mechanisms	11
	A. Legal standards	11
	B. Registration	13
	C. Licensing	13
	D. Accountability mechanisms	14
	E. Vetting legal and human rights training	14
	F. Oversight	16
V.	Future activities	16
VI.	Conclusions and recommendations	16
Annex		
	Status of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries	20

I. Introduction

1. The Commission on Human Rights, by its resolution 2005/2, decided to establish a Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, made up of five independent experts, for an initial period of three years. From March 2007 to April 2008, Mr. José L. Gómez del Prado (Spain) was the Chairperson-Rapporteur of the Working Group. At its third session, in April 2008, the Working Group, in accordance with its methods of work, elected Mr. Alexander Nikitin (Russian Federation) as its Chairperson-Rapporteur. Ms. Najat Al-Hajjaji (Libyan Arab Jamahiriya), Ms. Amada Benavides de Pérez (Colombia) and Ms. Shaista Shameem (Fiji) are the other members of the Group.

2. At its seventh session, the Human Rights Council, by its resolution 7/21, renewed the mandate of the Working Group for a period of three years and extended it to: elaborate and present concrete proposals on possible complementary and new standards aimed at filling the gaps, general guidelines or basic principles encouraging the further protection of human rights, in particular the right of peoples to self-determination, while facing current and emergent threats posed by mercenaries or mercenary-related activities.

3. Pursuant to its mandate, the Working Group has continued, inter alia, to monitor mercenaries and mercenary-related activities in all their forms and manifestations, as well as to study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights. During the period under review, the Working Group held its third session (Geneva, 7-11 April 2008), undertook a field visit to the United Kingdom of Great Britain and Northern Ireland and convened a regional consultation for Latin America and the Caribbean on the "Effects of the activities of private military security companies on the enjoyment of human rights: regulation and oversight".

4. For the purposes of the report, while recognizing the definitional challenges, in referring to private military and private security companies the Working Group includes private companies that perform all types of security assistance, training, provision and consulting services, including unarmed logistical support, armed security guards, and those involved in defensive or offensive military and/or security-type activities, particularly in armed conflict areas and/or zones.

5. Accordingly, pursuant to General Assembly resolution 62/145, the Working Group submits its third report to the General Assembly, for consideration at its sixty-third session.

II. Activities of the Working Group

A. Third session of the Working Group

6. At its third session, held in Geneva from 7 to 11 April 2008, the Working Group elected Mr. Alexander Nikitin (Russian Federation) as its Chairperson-Rapporteur for the coming year and convened consultations with representatives of Member States, United Nations agencies and organs, the Office of the United

Nations High Commissioner for Human Rights (OHCHR), the International Committee of the Red Cross (ICRC), academics, non-governmental organizations and an association of private military and security companies.

7. After having considered a number of country situations, the Working Group decided to send letters of request, or to renew its requests, to visit Armenia, Azerbaijan, Colombia, Equatorial Guinea and the United States of America. By letter dated 24 June 2008, the Government of the United States accepted the request of the Working group to visit that country. The Working Group also decided that, in compliance with Human Rights Council resolution 7/21, the next regional consultation would be held for countries of Eastern Europe Group and Central Asia region. Finally the Working Group also decided on the procedure for drafting guidelines for regulations of private security and military companies.

B. Field missions

1. Mission to the United Kingdom of Great Britain and Northern Ireland

8. A delegation of the Working Group, composed of its Chairperson-Rapporteur and one member, visited the United Kingdom from 26 to 30 May 2008.

9. The comprehensive report of the mission, including its conclusions and recommendations, will be presented to a forthcoming session of the Human Rights Council. An overview of its preliminary observations upon the completion of the visit are presented below.

10. During its visit, the Working Group collected information useful for the fulfilment of its mandate, which is, in part, to monitor and study the effects on the enjoyment of human rights of the activities of private companies offering military assistance, consultancy and security services on the international market and to prepare a draft of international basic principles that encourage respect for human rights by those companies in their activities.

11. The Working Group considered information on the system of regulation of activities of private military and security companies registered in the United Kingdom. In the process of doing so, it met with representatives from Governmental agencies, civil society and representatives of private military security companies, as well as the British Association of Private Security Companies.

12. The Working Group is recommending that the Government of the United Kingdom undertake a new comprehensive inquiry into the status and regulation of private military and security companies in Britain, make a policy choice between six options for regulation elaborated in the 2005 Green Paper and take an active stand in the elaboration of the international regulatory instruments for private military and security companies.

2. Other missions in preparation

13. The Working Group will consider visiting Afghanistan at the end of 2008 and the United States of America at the beginning of 2009. Comprehensive reports, including conclusions and recommendations, on these missions will be presented to a forthcoming session of the Human Rights Council.

C. Regional consultation

14. The Working Group convened a first regional consultation for Latin America and Caribbean countries on 17 and 18 December 2007, in Panama City.

15. The objectives of the consultation were to gather a regional perspective about the current recruiting practices of private military and security companies of personnel to be deployed in armed conflict or post-conflict situations and to share information on steps taken by States in the region to introduce legislation and/or other measures to regulate and monitor the activities of such companies on the international market.

16. The Working Group discussed general guidelines, norms and basic principles for the regulation and oversight of the activities of private companies offering military assistance, consultancy and security services on the international market with representatives of the Governments of the region, with a view to encouraging the further protection of human rights.

17. Representatives from the Governments of Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Honduras, Panama and Paraguay participated in the consultation. In addition, representatives of the Inter-American Institute of Human Rights, four academic experts and representatives of two associations of private military and security companies, the International Peace Operation Association and the British Association of Private Security Companies also participated in the debates.

18. The Working Group collected factual data on the activities of private military and security companies in countries of the region and engaged in discussions on the regulation and status of such companies at the international level with the Government representatives.

D. Communications

19. The Working Group has received information from Governments, non-governmental organizations and individuals concerning situations involving mercenaries, mercenary-related activities and private military and security companies. During the year under review, communications have been sent to Australia, Colombia, Iraq, Israel,[1] Mexico and the United States. The communications and summaries of responses received from Governments will be reflected in the forthcoming report of the Working Group to the Human Rights Council.

E. Other activities

20. On 12 September 2007, the former Chairperson-Rapporteur participated in a round table on the legal implications of the human rights to peace during the sixth session of the Human Rights Council. The round table was organized by the Spanish Society for the Advancement of the International Human Rights Law.

[1] A copy of the letter was also sent to the Palestinian Authority.

21. From 31 January to 1 February 2008, the former Chairperson-Rapporteur and a member of the Working Group participated in an international conference on the "Privatization of Security and Human Rights in the Americas: Perspectives from the Global South" at the University of Madison, Wisconsin. The conference was organized by the University of Madison and established an international research network on private military and security companies.

22. On 5 and 6 June 2008, José Luis Gómez del Prado participated in a conference on the "Social Construction of Threat and the Changing Relation between Liberty and Security" at the Centre for European Policy Studies, in Brussels.

23. In January 2007, a member of the Working Group established an Academic Network, composed of academics and representatives of non-governmental organizations, to investigate the phenomenon of mercenarism and private military and security companies in Bogotá.

24. In the course of the past year, the Chairperson and members of the Working Group have given numerous interviews and provided information to the mass media on the export of military and security activities by transnational companies, the privatization of warfare and security and the implication in human rights of such activities.

25. In addition, since June 2008, José Luis Gómez del Prado has been a member of the Geneva Centre for the Democratic Center of Armed Forces Advisory Group on "Private Security Regulation.Net", an Internet-based resource for the regulation of private military and security companies.

III. International and regional developments

26. During the period under review transnational private military and security companies, mainly from the United States and the United Kingdom, but also from Australia, Canada, Israel and other countries, continued to export their services to over 50 countries, in particular to countries where low intensity armed conflicts are ongoing, including Afghanistan, Iraq, the Democratic Republic of the Congo, Somalia and the Sudan. The industry is estimated to earn between $100 and $120 billion annually.

27. In Iraq there are more than 180 private military and security companies providing services to the multinational forces employing 48,000 private security guards.[2] In Afghanistan it is estimated that there are some 60 such companies with between 18,000 and 28,000 employees, 8,000 of them foreigners. Of that number, 6,000 are employed by the two largest American companies, Blackwater and DynCorp, but some are also employed by Aegis, ArmorGroup, Global and Kroll.[3] The outsourcing of military and security functions, formerly performed by States, has become multidimensional. Such personnel are employed in: recruiting and management of police personnel for international missions; patrolling oil fields and oil-pipelines; protection of Iraqi energy systems; guarding embassies; controlling

[2] United States Government Accountability Office, *Rebuilding Iraq — Actions Still Needed to Improve the Use of Private Security Providers*, statement of William Solis, Director, Defense Capabilities and Management, June 2006.

[3] Swisspeace, "Private Security Companies and Local Populations, Berne, 2007. See also, *The Times*, 11 and 12 February 2008.

prisons in Iraq and Afghanistan; de-mining and destruction of explosives; and numerous other functions.

28. The civilian population is often the victim of the activities of private military and security companies, which put their employees in direct contact with the public, as shown by the tragic events of 16 September 2007 in Nisour Square in Baghdad, in which employees of Blackwater allegedly opened fire and killed 17 and injured more than 20 civilians, including children and women. Under order 17, issued by the Administrator of the Coalition Provisional Authority on 27 June 2004, foreign private contractors are immune from prosecution. However, the Iraqi Ministry of Justice recently stated that families of the civilians allegedly killed by employees of Blackwater in the incident of 16 September 2007 have brought legal cases before the Iraqi tribunals.[4]

29. Unfortunately, the case of Blackwater is not an exception. Other private military and security companies have been reported to be involved in such incidents, in particular: the killing of two Iraqi women and the injuring of three civilians in Kirkuk involving Erinys International; the killing of an Iraqi taxi driver who allegedly was shot three times by employees of DynCorp International, hired to protect American diplomats; the killing by a Blackwater employee of three Iraqi guards working for the Iraqi media network;[5] and the involvement of employees of the Unity Resources Group protecting a convoy, in central Baghdad, in shooting of Iraqis, which left two Iraqi women dead (reports on this incident indicate that approximately 30 to 40 shots were fired).

30. These sorts of incidents involving private military and security companies have been prevalent in the reconstruction of Iraq since its occupation in 2003. Other such companies, for example Triple Canopy[6] and Aegis,[7] have also been involved in similar incidents.

31. It is estimated that 15 to 34 per cent of reconstruction aid to countries such as Iraq and Afghanistan is spent on security services provided by private military and security companies. According to a recent report by Integrity Watch Afghanistan, Afghans receive only an average $20 out every $100 spent on reconstruction and aid. In November 2007, some nine unlicensed private military and security companies were shut down in Afghanistan and a statement issued by the Office of the President indicated that all private security firms operating in Afghanistan had to close down. The President's spokesman stated that under the Constitution only the forces of the Afghan Government had the right to possess and handle weapons.[8]

---

[4] *Publico*, "El ministro de Justicia de Irak, Safa al Safi", Madrid, 20 July 2008.

[5] War on Want, "Getting Away with Murder: The need for action on UK PMSC", briefing, December 2007 (www.waronwant.org).

[6] "Four Hired Guns in an Armored Truck, Bullets Flying, and a Pickup and a Taxi Brought to a Halt. Who Did the Shooting and Why? A Chaotic Day On Baghdad's Airport Road", Steve Fainaru, *Washington Post Foreign Service*, 15 April 2007.

[7] A video published on the Internet showed mercenaries from Aegis Defence Services randomly shooting at civilian cars from the back of their vehicle on the road to Baghdad airport. A statement issued by Aegis said that the investigations carried out by the United States Army and by an independent panel of inquiry organized by Aegis indicated "that all of the circumstances, when seen in context, were within the approved and accepted rules for the use of force, that no crime had been committed,".

[8] *Agence France Press*, 22 November 2007.

32. During the period under review, private military and security companies continued to contract third country nationals from all regions of the world in order to cut costs and increase profits. For example, an estimated 1,500 Ugandans worked for the Special Operations Consulting-Security Management Group. In October 2007, the Namibian authorities ordered two employees of the same company to leave the country for trying to recruit Namibians to work as "private security guards" in Iraq and Afghanistan. The company was shut down on the grounds that it violated Namibian laws.[9] The Working Group reiterates its concern regarding the rise in the contracting and use of Latin American nationals to work in conflict zones, as noted in previous documents.[10] It is also concerned that, despite its work in monitoring the phenomenon and the attempt to alert States to the challenge, the problem continues to grow. According to estimates by the Working Group the number of Latin Americans working as security guards in Iraq is over 3,000.

33. In his press statement the Special Rapporteur on extrajudicial, summary or arbitrary executions after having visited the United States in June 2008, Professor P. Alston identified the issue of ensuring accountability for killings by private security contractors and civilian Government employees in Afghanistan and Iraq. He referred to the "existence of a zone of de facto impunity for killings by private contractors operating in Iraq and elsewhere" which had been tolerated for too long. He added that the United States Department of Justice, which is responsible for prosecuting private security contractors, civilian Government employees and United States soldiers for violations of a range of federal statutes, had failed and the legislative initiatives taken by Congress to deal with such human rights violations as the abuses committed at Abu Ghraib and the killings at Nisour Square had been largely in reaction to specific incidents. In October 2007, an oversight panel of the United States House of Representatives released a report indicating that Blackwater employees had been involved in at least 196 fire-fights in Iraq since 2005, an average of 1.4 shootings per week. In 84 per cent of those cases, the reports stated, Blackwater employees opened fire first, despite contract stipulations to make use of force only in self-defence.[11]

34. Amnesty International[12] has indicated that of the 20 known cases of civilians suspected of criminal acts there has been only one indictment of a contractor on assault charges in connection with the death of a detainee in Afghanistan. There has not, however, been a single prosecution of a private military contractor in Iraq.

35. In his report to the Security Council, the Secretary-General underscored the danger of the activities conducted by private military and security companies in situations that include the protection of personnel and assets, interrogation of prisoners and even participation in combat operations. The report underlined the obligation of the employees of private military and security companies to comply

[9] *Reuters*, 13 October 2007. Special Operations Consulting-Security Management Group is a United States-based private military company employing 300 former United States soldiers in Iraq. They provide services in force protection, personal security, convoy security operations, consulting and threat assessment and training.

[10] See A/HRC/4/42 and Add.1 and 2, A/61/341, E/CN.4/2006/11/Add.1, and E/CN.4/2006/11.

[11] Bryan Bender, "United States control over guards in Iraq urged, Blackwater criticized", *Globe Staff*, 3 October 2007.

[12] Larry Cox, Executive Director, Amnesty International USA, 2006 Amnesty International report.

with international human rights and humanitarian law as well as the responsibility of the States hiring them.[13]

36. Since its first session, the Working Group has defined the study of possible effects of Government accords that confer immunity to private military and security companies and their employees as a priority. In many cases the contractors and the companies act in a context free of control by or subordination to country authorities, which implies a number of risks. The impunity conferred on the private military security companies has created a form of judicial uncertainty that has permitted the evasion of responsibilities on the part of their employees regarding the commission of illicit actions or human rights violations.

37. The Working Group has also recognized an emerging phenomenon in Latin America regarding the use of private security companies increasingly involved in the protection of geo-strategic sites such as mines, oil extraction sites, forests and water sources through the repression of social protest. In such situations, the legitimate social protest by peoples in defence of their land and their environmental rights is confused with criminal or terrorist actions and those protesting in defence of their human rights are prosecuted, charged, intimidated or killed. The Centro de Estudios en Seguridad Pública in Mexico stated that, with the reform of the petroleum sector, some risk exists that foreign private petroleum companies may come to the country with their own private security companies.[14] Another particularly worrying pattern in exporting private military and security services by transnational companies has been the contracting by the Mayor of the city of León, Mexico, of the company Risks Incorporated, established in Miami, United States, allegedly to train the local police in torture techniques.[15] Such companies have also been involved with federal and municipal policemen in human rights violations in Mexico.

38. Even though the presence of "classical" mercenaries in national conflicts seems to be quite rare today, Latin America presents examples that demonstrate their presence. One case is that of Yair Klein, captured in August 2007 in Moscow by INTERPOL with a mandate for extradition released by the Government of Colombia on 28 March 2007. Klein was condemned to a sentence of 10 years and eight months imposed by the Superior Tribunal of Manizales in 2001 where he was charged and tried for providing instruction and training in military and terrorist tactics, techniques and procedures, including conspiracy, with an aggravated charge for having done so with mercenaries. Klein has also been charged and fined $13,400 by an Israeli tribunal for arms sales to illegal Colombian groups and was previously detained for 16 months in Sierra Leone for the sale of arms to a rebel group.

39. The Working Group would like to report some advances in relation to the internal voluntary principles established by some nations for the control of private military and security companies. For example in the Dominican Republic, police and private security companies signed a cooperation agreement in April 2008. While these measures represent an advance, they are voluntary in character and do not have compulsory or obligatory legislation, which reduces the capacity of the State to exercise sanctions in case of non-fulfilment.

---

[13] S/2007/643.

[14] See http://www.jornada.unam.mx/2008/07/22/index.php?section=politica&article=005n2pol.

[15] Jorge Carrasco Araizaga, "Mercenarios en Mexico", 18 July 2008. Risks Incorporated is a London-based, owned and managed bodyguard school and executive protection company.

40. It should be mentioned that a number of private military and security companies figure in the United Nations Procurement Service-List of Registered Vendors. In that connection, the Working Group has recommended that United Nations departments, offices, organizations, programmes and funds establish an effective selection and vetting system and guidelines containing relevant criteria aimed at regulating and monitoring the activities of private security/military companies working under their authority. They should also ensure that the guidelines comply with human rights standards and international humanitarian law.

IV. Elaborated principles, guidelines and criteria for national and international regulation mechanisms

41. Based on its country visits and consultations with various stakeholders, the Working Group has started to establish a framework of principles and criteria for the elaboration of national and international regulation mechanisms to address the activities of private military security companies. This is still a work in progress based on the observations of the Working Group, which intends to continue its consultations with Governments, international and regional organizations, civil society and the private military and security industry to come up with concrete proposals on possible complementary and new standards aimed at filling the gaps, general guidelines or basic principles encouraging the further protection of human rights, in particular the right of peoples to self-determination, while facing current and emergent threats posed by mercenaries or mercenary-related activities.[16]

A. Legal standards

42. The main initial step to regulate activities of private military and security companies and their employees would be to establish legal standards defining a juridical framework for the activities of these companies.

43. It has proven difficult to legally qualify activities performed by private military and security companies and their employees. As previously stated by the Working Group, most of these companies are operating in a "grey zone" not defined or not clearly defined by international legal norms.[17]

44. The relation between private military and security companies and mercenary service is not direct. Performing various activities under Governmental contracts and sometimes under international intergovernmental agreements, even in conflict zones, does not fall, in most cases, under the "traditional" legal definition of a mercenary.

45. In its resolutions on the subject, the General Assembly points to "gaps" in existing legal norms, which need to be filled in order to regulate private military and security companies and assure their respect of human rights. To identify these gaps, it is important to recognize that the International Convention against the Recruitment, Use, Financing and Training of Mercenaries remains the only universal instrument dedicated in addressing this matter. In its definition of mercenarism, the

[16] Human Rights Council resolution 7/21, para. 2 (a).
[17] A/HRC/7/7, para. 25.

Convention takes into consideration not only situations of armed conflict but also of violence organized to bring about the collapse of a Government, to undermine constitutionality or to act against the territorial integrity of a State. The Convention criminalizes the recruitment, financing, training and use of mercenaries.

46. International humanitarian law contains only one provision specifically addressing the issue of mercenaries, namely article 47 of the first additional protocol of 1977 to the Geneva Conventions of 1949. Ratified by a large majority of States, article 47 does not forbid mercenary service. It states that mercenaries are denied the privileged status of a combatant or a prisoner of war and that they can therefore be held responsible by the opposing State for having taken part in an international armed conflict. A State is not obliged, however, to deny prisoner of war status. In addition, paragraph 2 of article 47 contains a definition of mercenary, with six conditions. Only a small portion of the employees of private military and security companies involved in military functions could be qualified as mercenaries.

47. In 1970, the General Assembly, by its resolution 2625 (XXV) adopted the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. The first principle of the declaration deals with the ban on the use of force and falls under international customary law. The declaration makes it a duty of the State not to use "mercenaries, irregular forces or armed bands" against the territorial integrity or independence of another State. The declaration does not, however, define what is meant by irregular forces or armed bands.

48. At the regional level, in 1977 the African Union (formerly the Organization of African Unity) drafted the Convention for the Elimination of Mercenarism in Africa. In that convention, the definition of the term "mercenary" is similar to the one used in article 47 of the Geneva Convention.

49. In 2005, the Parliamentary Assembly of the Council of Europe issued recommendation No. 1713 on democratic oversight of the security sector in member States. The last provision of the recommendation which relates to private companies dealing with intelligence and security affairs, states that they should be regulated by law and that specific oversight systems should be put in place, preferably at the European level. According to the document, such regulations should include provisions on parliamentary oversight, monitoring mechanisms, licensing provisions and means to establish minimal requirements for the functioning of those private companies.

50. Also in 2005, 12 States members of the Commonwealth of Independent States adopted a model law on counteracting mercenarism, in which more modern multidimensional definitions of mercenary activities were agreed upon. The model law postulates a possibility of mercenarism based on motivation of non-material gains (including ideological and religious motivations), and makes various claims as to the rights of the States to prevent, if required, the operation of foreign mercenaries and recruiting organizations (companies) on their territories, and to punish parties for spreading propaganda about mercenary-related activities or the financing of such activities. The law partially bridges the gap between regulation of mercenaries and the regulation of private military and security companies.

51. At the national level, countries that have already passed laws on mercenarism include: Belgium, Italy, South Africa, New Zealand, France and Zimbabwe.

B. Registration

52. The Working Group believes that the setting of an open international register for private military and security companies would constitute an important step in regulating their activities. The register, which could be based on the experience of other registers established at the international level, would require the adjustment of national regulations regarding the registration of military and security companies.

53. In 1991, the General Assembly adopted resolution 46/36 L, by which it requested the Secretary-General to establish and maintain a universal and non-discriminatory Register of Conventional Arms, including data on international arms transfers and information provided by Member States on military holdings, procurement through national production and relevant policies.[18]

54. The Register comprises seven categories of major conventional arms. It has been in operation since 1992. Thus far, a total of 172 States have reported to the Register one or more times. The Register captures the great bulk of the global arms trade in the categories of conventional weapons covered by it.

55. An international registry of international arms transfers will be put in place in the next few years. In a draft framework convention on international arms transfers of 25 May 2004,[19] it was stated that an international registry of international arms transfers would be established. The draft convention also provides that contracting parties would submit to the international registry an annual report on arms transfers from or through their territory or subject to their authorization and that the international registry would publish annual and other periodic reports, as appropriate, on international arms transfers.

56. Export of military and security services should be placed under the category similar or comparable to export of arms or military equipment, and Governments should be required to provide regular reports to the United Nations both for outgoing and incoming military and security services.

C. Licensing

57. Licensing procedures and practices are the mechanisms by which individual export licence decisions are made. Export licensing procedures[20] are "transaction-based": a specific licence is issued to authorize each export transaction.

58. The draft framework convention on international arms transfers[21] states, in article 5, that contracting Parties should establish authorization and licensing mechanisms under their national laws, as necessary, in order to ensure that the requirements of the convention may be effectively applied. At a minimum, it was planned that each application for authorization would be reviewed and licensed individually. The licensing procedure is already part of the arms control mechanism of most States and is also being incorporated into regional arms control arrangements. The Working Group believes that national Governments should

[18] See http://disarmanent.un.org/cab/register.html.

[19] See http://www.iansa.org/documents/2004/att_0504.pdf.

[20] See http://www.heritage.org/research/regulation/wm_1798.cfm.

[21] See http://www.iansa.org/documents/2004/att_0504.pdf.

implement licensing mechanisms for the export of military and security services and that the licences should be given on a contract basis.

59. The Council of the European Union has passed a resolution introducing a European Code of Conduct, which is intended to prevent the flow of arms from countries members of the Union to unstable regions of the world where gross human rights violations may take place. The code also includes a list of sensitive destinations and provides a system of verifying and monitoring the use of arms. In addition, the code puts in place a system of sharing of information and consultation on the granting and denial of export licences at the national level.

60. The European Code of Conduct is not legally binding for the States parties to it, and there is no mechanism to hold them accountable for failing to respect it. However, the code defines eight criteria that member States must address in case of arms export, inter alia: respect for the international commitments of the member States of the Union, in particular the sanctions decreed by the United Nations Security Council and the respect of human rights in the country of final destination.

61. In North and South America, 19 members of the Organization of American States have signed an agreement on conventional arms transfers, the Inter-American Convention on Transparency in Conventional Weapons Acquisitions, which requires signatories to disclose information on major arms exports and imports annually.[22] It does not, however, put in place a registration or licensing system, either for arms or for military and security services.

D. Accountability mechanisms

62. In order for any regulation mechanisms to be implemented for private military and security companies, accountability mechanisms should be put in place to ensure that it is enforceable.

63. The formulation of minimum required transparency criteria for such companies may require private military and security companies to submit data annually on the main parameters of their structure, contracts and operations.

64. In some States,[23] domestic criminal jurisdictions sought to close jurisdictional gaps for civilians accompanying the armed forces or employed by them in areas where the armed forces are engaged in military operations.

65. However, apart from the formal judicial mechanisms, other mechanisms can be put in place to ensure accountability of individuals and companies providing security or military services.

E. Vetting legal and human rights training

66. The usual vetting mechanisms[24] that apply to the institutions of post-conflict States, usually public institutions, can be transferred to the private military and security companies.

---

[22] See http://www.oas.org.

[23] In the United States, the War Crimes Act (1996, amended 1997) and the Military Extraterritorial Jurisdictional Act (2000).

67. The first step of vetting, which consists in creating a commission to lead the transitional personnel reform, could be applied to private military and security companies during the hiring process.

68. In such a review, a special transitional mechanism is usually established to screen serving employees and determine their suitability for continued service. The objective is to remove those who are unfit to hold office. A review process should be individualized. Employees subject to a review should be granted a fair hearing. In general, the burden of proof falls on the reviewing body to establish that a public employee is not suitable to hold office.

69. A personnel reform process consisting of three phases: registration, screening and certification could also be applied to the private security industry.

70. The registration of the public employees to be vetted is necessary if the personnel records of an institution are not properly maintained and if the number and the status of public employees are uncertain. The basic objective of registration is to determine and close the pool of those individuals who belong to an institution and are, therefore, to be included in the personnel reform. Registration forms include basic information on an employee and her or his professional record.

71. Once the employees to be included in the reform process have been determined, they are screened to assess if they meet the criteria for continued employment. Employment criteria are post-specific and are determined in accordance with the level of the post in the organizational structure of an institution. Information on individual employees is systematically collected and stored in the personnel registry. Data from the integrity databank need to be integrated in order to include relevant background information in the personnel registry. The screening consists of applying employment criteria to data on individual employees. Additional checks and independent investigations may be necessary to complete missing information or to verify doubtful information.

72. Employees who meet the employment criteria are certified. Certification constitutes the final decision on the status of a public employee in the transition. The personnel reform is completed once the certification status of all employees has been determined. Certification could also require completion of a probationary period of service. During the probationary period, employees and new recruits could be removed more easily if additional information emerged about past misconduct.

73. During the period under review different stakeholders have stressed that the one indispensable element in any regulation mechanism is mandatory human rights and legal training of the employees of private military and security companies.

74. Thus far, some companies have initiated such training, although no institutionalized course is being integrated into the induction training provided to employees.

[24] OHCHR, *Rule-of-Law Tools for Post-Conflict States, Vetting: an operational framework*, New York and Geneva, 2006.

F. Oversight

75. Parliamentary oversight of private military and security companies could involve regular parliamentary hearings, inquiries and investigations, including the creation of a specific committee, subcommittee or commission within the parliamentary structures of countries exporting security and military services aimed at scrutinizing the delivery of licences according to a code of conduct. This committee could have powers to grant or refuse the issuing of such a licence in case of military-related activities in a country where human rights abuses are common.

V. Future activities

76. In the coming year the Working Group will pursue consultations with Member States to promote the widest possible ratification/accession to the 1989 International Convention.

77. With a view to negotiating and arranging future country visits, the Working Group will continue its consultations with the delegations of Armenia, Azerbaijan, the Central African Republic, Chad, Colombia, Equatorial Guinea, Ghana, Iraq, Papua New Guinea, South Africa and Zimbabwe.

78. Moreover, pursuant to Human Rights Council resolution 7/21, in October 2008 the Working Group will convene a regional consultation for countries from Eastern Europe and Central Asia on the "Effects of Activities of Private Military Security Companies on the Enjoyment of Human Rights: Regulation and Oversight". It has been recommended that the Working Group convene five regional consultations, followed by a high-level round table, under United Nations auspices, in conformity with a request to OHCHR in General Assembly resolution 62/145. This process may lead to the holding of a high-level round table of States to discuss the fundamental question of the role of the State as holder of the monopoly of the use of force, with the objective of facilitating a critical understanding of the responsibilities of the different actors, including private military and security companies, in the current context, and their respective obligations for the protection and promotion of human rights and in reaching a common understanding as to which additional regulations and controls are needed at the international level.

VI. Conclusions and recommendations

79. **Despite the current international changes, the use of mercenaries in both traditional and non-traditional formats remains a serious problem in the world today. There has been widespread and direct use of mercenaries and mercenary-related activities in many conflict areas in Europe, Asia and the Pacific, Africa and the Americas during the period under review.**

80. **The United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries, which has been ratified and/or signed by 40 nations, remains an important international legal instrument for the prevention of the use of mercenaries as a means of violating human rights and the rights of people to self-determination.**

81. **The Working Group strongly recommends that countries that have signed but have not yet ratified the Convention[25] proceed as soon as possible with the finalization of necessary procedures for the ratification of this important international instrument. Some countries which are parties to the Convention but have not yet introduced any national legislation on regulating mercenarism,[26] should proceed with the elaboration and adoption of national laws in this regard. Noting with satisfaction that during the reporting period the process of full accession to the Convention continued,[27] the Working Group appeals to countries that are yet not parties to the Convention to consider accession to it.**

82. **The Working Group conducted further study of existing international, regional and national legislation on mercenaries and noted that some modernization of legal instruments in the field have taken place. This modernization was embodied in recent years by the adoption of new national legislation on the use of mercenaries (France, South Africa) and some new regional instruments (for example, Commonwealth of Independent States model law of the Commonwealth of Independent States on counteracting mercenarism, the elaboration of proposals for amendments to the Convention on Mercenaries of the African Union).**

83. **The practice of using private military and security companies constitutes a relatively new area of the mandate of the Working Group. The Group undertook intensive study of the current situation with regard to the activities and regulation (or lack of regulation) of these companies. The study revealed wide discrepancies among the companies, their contracting practices, level of professionalism, standards of training and ability to assure respect for human rights. Actual cases were studied (some covered in the present report), in which private military and security companies or their employees were clearly violating human rights norms and principles. The Working Group has concluded that urgent actions are required at the level of the international community to elaborate and promote a comprehensive regulatory system for these companies.**

84. **The Working Group recommends that separating the criminalization of prohibited "traditional" mercenary activities (for example, the participation of foreign recruited armed personnel in the overthrow of legitimate State authorities) from the general context of the activities of the private military and security companies could be done on the basis of existing legislation on mercenaries, if the party involved is a signatory to the United Nations Convention or has passed a specific national law on mercenaries. However, the Working Group has concluded that the general activities of these companies cannot be regulated only on the basis of the United Nations Convention even after an exercise of modernization and amendment has taken place. A new international legal instrument, possibly in the format of a new United Nations**

---

[25] Angola, the Congo, the Democratic Republic of the Congo, Germany, Montenegro, Morocco, Nigeria, Poland, Romania and Serbia.

[26] Georgia, which reported the use of foreign mercenaries in the course of 2008 armed conflicts on its territory, is an example.

[27] In 2007 Cuba and Peru finalized ratification and accession procedures and became full members of the Convention.

convention on private military and security companies, may be required. Such a convention might be supplemented by another legal instrument, a model law on private military and security companies, which would assist national Governments in the elaboration and adoption of national legislation on their regulation.

85. **The Working Group also recommends that the approach of the international community to the private military and security companies needs to proceed from perceiving them as part of the regular "business as usual" exports under commercial regulations towards perceiving them as highly specific field of exports and services requiring supervision and constant oversight on behalf of the national Governments, civil society and international community, led by the United Nations. Both national Governments and the United Nations system must take greater responsibility for where and for what purpose such companies are operating worldwide.**

86. **The Working Group further recommends that an export of military and security services, including military consultancy and training of certain types within this area of services, should be placed under a category similar or comparable to export of arms or military equipment, and that Governments be required to provide regular reports to the United Nations on contracts in this field for both outgoing and incoming military and security services.**

87. **The Working Group suggest that best practices of export control and arms licensing, as well as the experience with the United Nations Register on Conventional Arms, could be taken into consideration while elaborating regulations for export of military and security services.**

88. **Most national Governments do not now possess systematized information on which military and security companies are registered on their territory and which companies originating from their country are registered abroad, sometimes in off-shore zones. It is recommendable that national Governments consider the creation of a separate register for military and security companies and prohibit, by national regulations, the registration of companies belonging to the field of military and security services in off-shore "minimal transparency" zones. The United Nations system might consider to extend the existing mechanism of the United Nations Register on Conventional Arms to cover the export/import of military and security services, or to include, at least, those involving the possession or use of lethal arms.**

89. **The Working Group believes that the licensing mechanism for export of military and security services is to be established by States under national law (with a "contract" rather than "company" as a unit for licensing). In addition, minimum required transparency criteria for private military and security companies should be formulated, a process which may require that such companies submit data annually on the main parameters of their actual current structure, contracts and operations.**

90. **In the elaboration of guidelines and principles for the regulation of private military and security companies and the prevention of the violation of human rights norms and standards by them, the Working Group intends to focus its work on the study and legal codification of the comprehensive system of oversight and regulation for private military and security companies, including**

legal and procedural means at international, regional and national levels, in order to assure:

(a) Respect of the private military and security companies as legal bodies and their employees as natural bodies for the universal norms of human rights and humanitarian law;

(b) Respect of the private military and security companies and their employees for national laws of countries of origin, transit and operation;

(c) Respect of the sovereignty of States, internationally recognized borders and rights of people for self-determination;

(d) Non-participation of private military and security companies and their employees in any activities aimed at: overthrowing legitimate Governments or authorities, violent change of internationally recognized borders or taking violent foreign control over natural resources;

(e) Guaranty of legitimate ways of acquiring, exporting, importing, possession and use of weapons by private military and security companies and their employees;

(f) Guaranty of adequate, mandated and proportional use of force;

(g) Restraint from the overuse of weapons, total prohibition of use of weapons of mass destruction, or weapons resulting in overkill, mass casualties or excessive destruction;

(h) Accountability of private military and security companies before the Governments of the country of origin (registration) and country of operations;

(i) Adequate public transparency over the activities of private military and security companies;

(j) Mechanism for the detailed registration of private military and security companies;

(k) Mechanism of licensing of the contracts of private military and security companies for operation abroad;

(l) Mechanisms of monitoring, inquiries, investigations, complaints and allegations regarding activities of private military and security companies;

(m) Mechanism of sanctions which may be applied nationally and/or internationally to private military and security companies in case of revealed violations;

(n) Standard mechanisms of contracting national and foreign personnel.

91. The Working Group expresses its thanks to all Member States, departments, programmes, bodies and agencies of the United Nations, including experts and non-governmental organizations, which assisted it in the fulfilment of its mandate.

Annex

Status of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, was adopted by the General Assembly in its resolution 44/34 and entered into force on 20 October 2001. The status of the International Convention, as of 8 August 2008, is presented below.

State	*Signature, succession to signature (a)*	*Ratification, accession (b)*
Angola	28 December 1990	
Azerbaijan		4 December 1997[b]
Barbados		10 July 1992[b]
Belarus	13 December 1990	28 May 1997
Belgium		31 May 2002[b]
Cameroon	21 December 1990	26 January 1996
Congo	20 June 1990	
Costa Rica		20 September 2001[b]
Croatia		27 March 2000[b]
Cuba		9 February 2007[b]
Cyprus		8 July 1993[b]
Democratic Republic of the Congo	20 March 1990	
Georgia		8 June 1995[b]
Germany	20 December 1990	
Guinea		18 July 2003[b]
Italy	5 February 1990	21 August 1995
Liberia		16 September 2005[b]
Libyan Arab Jamahiriya		22 September 2000[b]
Maldives	17 July 1990	11 September 1991
Mali		12 April 2002[b]
Mauritania		9 February 1998[b]
Moldova		28 February 2006[b]

State	*Signature, succession to signature (a)*	*Ratification, accession (b)*
Montenegro	23 October 2006[a]	
Morocco	5 October 1990	
New Zealand		22 September 2004[b]
Nigeria	4 April 1990	
Peru		23 March 2007[b]
Poland	28 December 1990	
Qatar		26 March 1999[b]
Romania	17 December 1990	
Saudi Arabia		14 April 1997[b]
Senegal		9 June 1999[b]
Serbia	12 March 2001[a]	
Seychelles		12 March 1990[b]
Suriname	27 February 1990	10 August 1990
Togo		25 February 1991[b]
Turkmenistan		18 September 1996[b]
Ukraine	21 September 1990	13 September 1993
Uruguay	20 November 1990	14 July 1999
Uzbekistan		19 January 1998[b]

United Nations A/63/326

General Assembly

Distr.: General
25 August 2008

Original: English

Sixty-third session
Item 67 (c) of the provisional agenda*
Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives

Situation of human rights in the Palestinian territories occupied since 1967

Note by the Secretary-General**

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, submitted in accordance with Human Rights Council resolution 5/1.

* A/63/150 and Corr.1.

** The present report was submitted after the deadline so as to reflect the most recent developments.

08-48988 (E) 260908

Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967

Summary

The present report, the first submitted by Richard Falk, examines the observance of international humanitarian and international human rights standards in the Palestinian territories occupied by Israel since 1967 during the period from January to mid-2008. It pays particular attention to the consequences of a prolonged occupation that has consistently ignored the directives of the United Nations with respect to upholding the legal rights of an occupied people.

The report also takes note of the undertaking associated with the revival of the peace process at the Annapolis summit of December 2007, in particular the expectation that Israel would freeze settlement expansion and ease restrictions on movement in the West Bank. It is discouraging that the record shows settlement growth and further restrictions on West Bank movement.

In addition, the report notes the abuse of international humanitarian law associated with the separation wall, and Palestinian fatalities, including of children, owing to Israeli use of excessive force to quell non-violent demonstrations. Attention is also drawn to abuses by Israel at border crossings, with special concern expressed with regard to the harassment and assault of Palestinian journalists. The report further focuses on the crisis in health care, especially in Gaza.

The report laments the failure of Israel to implement the recommendations of the International Court of Justice, as endorsed by the General Assembly. It calls for a further clarification of the rights of the Palestinian people by recommending that the General Assembly seek legal guidance as to the extent to which the occupation is endangering the realization of the Palestinian right of self-determination.

Contents

		Page
I.	Introduction	4
II.	Political developments: major changes in the setting of the occupation	6
III.	Significant human rights challenges: some case studies	10
	A. Freedom of expression and harassment of media personnel: the case of Mohammed Omer	10
	B. Closures and Israeli Defense Forces military operations in the West Bank: abuses against the civilian population in Nablus	12
	C. Right to peaceful assembly: demonstrations against the wall in the West Bank	13
IV.	Settlements in the Palestinian Territories and their impact on the enjoyment of human rights	14
V.	Health crisis in the Palestinian Territories	16
	A. Further infringements affecting medical patients from Gaza: Shin Bet interrogation of Palestinian medical patients at the Erez crossing	19
VI.	Recommendations	20

I. Introduction

1. The Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 was appointed in accordance with resolution 1993/2 A of the Commission on Human Rights, on 26 March 2008, and took up his position on 1 May 2008. The Special Rapporteur has not yet been able to visit Israel and the Occupied Palestinian Territory so as to fulfil his mandate and offer a first-hand account of the degree to which international human rights and international humanitarian law are being observed. It is the hope and intention of the Special Rapporteur to do his best to secure entry in the future. He will seek to enlist the cooperation of the Government of Israel in that effort.

2. The present report is the first to be issued since the Special Rapporteur took up his mandate on 1 May 2008. The report covers developments taking place primarily from 1 January to 31 July 2008. It is based upon reliable information gathered by human rights non-governmental organizations and international institutions, including the United Nations, which have a long record of objectivity and experience in relation to the conditions of the occupation. The Special Rapporteur takes note of positive and negative changes on the ground and in the wider regional and global setting. It is the intention of the Special Rapporteur, without political implications, to treat the Hamas administration of Gaza as "a de facto authority" for the purpose of the present report.

3. The Special Rapporteur takes particular note of the fact that the military occupation of the Palestinian territory has gone on for more than 40 years and that it possesses characteristics of colonialism and apartheid, as has been observed by the previous Special Rapporteur. Especially in the light of that background, the further prolongation of the occupation constitutes a deepening threat to and a cumulative encroachment upon the most fundamental human right of all, the right of self-determination of the Palestinian people. That consideration imparts a tone of urgency to an evaluation of Palestinian claims of a right of resistance in furtherance of self-determination and to recommendations for a greater expression of responsibility by the United Nations to resolve the Israel-Palestine conflict, taking full account of international law, and, in the interim, to take immediate steps to ensure Israeli compliance with its obligations under international humanitarian law pertaining to military occupation. In that regard, note should be taken of the refusal of Israel to comply with the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (A/ES-10/273 and Corr.1), supported by 14 of the 15 judges, and overwhelmingly endorsed by the General Assembly in its resolution ES-10/15. That general observation relating to the continuing occupation has two implications for the United Nations. First, in the context of the Annapolis peace process, the United Nations, as a member of the Quartet, has a special responsibility to ensure that steps are taken to raise confidence among all the parties that international law will be relied upon to assess rival claims of both Israel and Palestine in the course of negotiations on outstanding issues of controversy. Second, that the disregard of such a clear and authoritative message as to international legal obligations pertaining to the duties of an occupying Power, together with other evidence of disregard detailed in this report, should serve to prompt the Secretary-General, the General Assembly and other bodies of the United Nations to recognize the need to implement urgently necessary initiatives to protect the rights, and indeed the survival, of the Palestinian

people, and to induce Israel to uphold its obligations under international law. One such initiative, consistent with the recommendation of the previous Special Rapporteur, would be for the Third Committee to propose to the General Assembly a request for a new advisory opinion by the International Court of Justice on the unlawful effects of the continuing denial of the Palestinian rights to self-determination, given the prolongation and character of the occupation, especially its encroachment on Palestinian ownership and occupation of land.

4. The pre-eminent legal instrument relevant to assessing the rights and duties of an occupying Power is the Fourth Geneva Convention Relative to the Protection of Civilians in Time of War (1949), but also relevant as expressive of the evolving customary international law, binding upon parties to the treaty, is the Geneva Protocol Additional I of 1977 Relating to the Protection of Victims to International Armed Conflict. The evidence of continuous and deliberate violation of that universally binding international treaty by Israel in its occupation of the Palestinian territory constitutes an ongoing grave situation that calls out for a unified response by the international community. It should be observed that article 1 of the Fourth Geneva Convention reads as follows: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". It is high time to heed the call of that provision.

5. The Government of Israel has contended, since its implemented disengagement plan in 2005, that the Gaza Strip is no longer under occupation, and that for that reason, international humanitarian law is not applicable. It is the official position of Israel, often repeated, that the "belligerent occupation of the Gaza Strip" by the Israeli Defense Forces ended as of 12 September 2005 "with all of the political, security and legal ramifications involved". Israel explicitly draws the main conclusion that since "full governmental powers" were on that date "transferred to the Palestinian Authority", it no longer has the legal and moral responsibilities of an occupying Power.[1] From that perspective, the Government of Israel relies on the decision of the Israeli Supreme Court in *Albassiouni v. the Prime Minister*, according to which the Government "does not have a general duty to take care of the welfare of Strip residents". The Special Rapporteur disputes that assessment of the situation in the Gaza Strip, contending that a territory is occupied if it is under the "effective control" of a State other than that of the territorial sovereign. Israel has, since its disengagement, continued to exert strict and continuous control over the borders, entrance and exit, airspace and territorial waters of Gaza. In addition, it has mounted numerous military incursions and deadly attacks on targeted individuals, and subjected the entire civilian population of the territory to siege conditions ever since Hamas convincingly won the general legislative elections in January 2006, and it tightened the siege after Hamas took over Gaza in mid-June 2007. The establishment of a siege imposing great stress on the inhabitants of Gaza and attempts to gain international participation in that siege have made it impossible for the administering Palestinian authorities to provide for the minimum well-being of the 1.5 million inhabitants. On the basis of those considerations, it is clear beyond a reasonable doubt that from the perspective of international law, the Gaza Strip remains under Israeli occupation, with legal responsibilities attendant on being the occupying Power, and that the Geneva Conventions remain fully operative.

[1] See "Response of coordinator of activities in the territories to report of Physicians for Human Rights' report on questioning of medical patients at the Erez crossing", Ministry of Defence, State of Israel, 4 June 2008.

6. There are many aspects of the daily and continuing situation in the Occupied Palestinian Territory relevant to a legal assessment of the rights and duties of the parties. A main goal of the present report is to convey a well-evidenced understanding of the extent to which the situation in all parts of the Occupied Palestinian Territory has continued to deteriorate, reaching dangerous and non-sustainable levels of mental and physical suffering and trauma for the Palestinian people living under occupation. That counters the view that because of several developments, including the Gaza Ceasefire, the positive relations between Israel, the United States of America and the Palestinian Authority, the revival of the peace process at Annapolis and the overall decline in violent Israeli civilian or military deaths and in the incidence of terrorism, the burdens of the occupation have been eased. It does seem true that the situation for Israel has improved economically and politically during that period, but the situation of the Palestinian people has worsened. More land has been taken for settlements, which have been expanded, the crisis conditions persist in Gaza as a whole, the restrictions on movement throughout the West Bank have been maintained or tightened, and additional legal moves to expel Palestinians living in Jerusalem have been taking place. In response to the very recent approval by the Government of Israel for construction of an additional 447 housing units in the Jerusalem area, the Palestinian peace negotiator, Saeb Erekat, was quoted as saying in a Reuters dispatch, "I don't know how many times the Israelis have to do this for the international community to open its eyes. Can't the world see this is destroying the peace process?" The main theme of the present report is that the Palestinian reality is worse than ever before, with no indication of any substantial improvement.

7. The present report attempts to strike a balance between highlighting incidents that illustrate deeper general problems associated with the occupation and discussing patterns of conduct that appear to violate the human rights of the occupied people, taking due account of the rights of the occupying Power to uphold security under conditions of occupation. In this report, the Special Rapporteur devotes a chapter to the right to health, with special reference to Gaza.

II. Political developments: major changes in the setting of occupation

8. The setting of the occupation is important for a meaningful evaluation of particular events and occupation policies, resistance activities and an assessment of the overall human rights situation, to the extent that the security of the occupier permits. The overall attention to these particular dimensions of the occupation helps keep attention on the centrality of the Palestinian right to and struggle for self-determination under conditions of prolonged occupation. All changes in the wider context of Israeli-Palestinian relations provide insight into the nature of the occupation, both in terms of its oppressive character and the difficulty of improving the conditions of the Palestinian people so long as they live under occupation.

9. Following the breaching of the wall separating Egypt from the Gaza Strip as a result of explosives set by Hamas near the Rafah crossing on 23 January 2008, tens of thousands of Gazans, with some estimates running as high as 500,000, crossed the border into the Egyptian city of Rafah, seeking particularly to buy food, medicines and a variety of consumer goods unavailable in Gaza. When asked by

border guards for guidance, the Egyptian President, Hosni Mubarak, was quoted as saying, "I told them, 'Let them come to eat and buy food, then they go back, as long as they are not carrying weapons'".[2] A spokesperson for Hamas is reported to have said, "We are creating facts. We have to try to change the situation, and now we await results. We warned the Egyptian people we are hungry and dying." Many Gazans without political affiliation said in various ways, "This is the best thing Hamas has done." The situation was well summarized by an independent journalist, Allan Nairn, who wrote, "... the Gaza wall-breaking was an easy call: no people were killed, some may have been saved, and the spectacle of exodus into Egypt effectively dramatized a gross injustice".[3] Nairn's language captures the main realities illuminated in relation to the occupation, that is to say, exodus and spectacle. It was not possible to witness the events without appreciating the desperation of people long confined by a stultifying occupation that threatens human well-being, even survival, and should not be allowed to endure. In a few days, the Gazans were required to return to Gaza, the wall was repaired and the conditions of siege and confinement were re-established. It is possible that subtle changes for the better resulted from the exodus and spectacle of the departing mass from Gaza, with the events leading to a wider international understanding of the desperate state of affairs produced by the enforced isolation and confinement of the 1.5 million Gazans.

10. No causal connection has been established or acknowledged between the events associated with breaching the Rafah wall and the initiation of secret negotiations under Egyptian auspices in Cairo between representatives of the Government of Israel and Hamas, with the objective of establishing a ceasefire agreement that would end the firing of rockets into Israel from Gaza and military incursions and targeted assassinations by Israel in the Gaza Strip. At the same time, it seems difficult to resist the view that the coverage, especially the pictures broadcast worldwide, of the wall being breached, encouraged Israel to be more receptive to long-standing Hamas offers to establish a mutual ceasefire. The negotiations were rather prolonged, but in the end they were successful. On 20 June 2008, a ceasefire was declared, and despite some infractions on both sides, it has generally held.[4] The terms of the ceasefire have not been made public, but it has been assumed by informed observers that a demonstration by Hamas of its will and capacity to enforce the ceasefire on its own militant groups would be matched by an easing of the siege by Israel.

11. Hamas' efforts to enforce the ceasefire have been recognized and reciprocated by Israel in the form of easing the hardships experienced by Gazans. Israel contends that it has increased the supply of food and medicine by as much as 50 per cent, and is considering further steps designed to ease tensions and hardships. Nevertheless, because the duration and intensity of the siege, imposed on pre-existing conditions of widespread poverty and hardship, have been so severe, humanitarian conditions inside the Gaza Strip remain dire, and pose great risks of future calamities.

12. An additional aspect of those developments is the implicit recognition by Israel of the de facto governance of Gaza by Hamas. According to Meir Javedanfar,

---

[2] See *The New York Times*, 24 January 2008.

[3] See Allan Nairn, "Justified Violence: Breaking the Gaza Wall", *The Nation*, 29 January 2008.

[4] For an assessment of the ceasefire, see Uri Avnery, "The Ceasefire", *London Review of Books*, 31 July 2008.

a respected Tel Aviv Middle East specialist, "[Hamas] is the power that Israel has to deal with. It's not full diplomatic recognition, but Israel has recognized Hamas as an important party. On some issues it can't be avoided. Israel is showing that its past policy of refusing to talk to militant organizations ... is not always functional ... [and has] realized that talking to its enemies is the shortest and most cost-effective path militarily, economically and strategically".[5] Officially, Israel has not altered its formal position to the effect that Hamas is a terrorist organization, and that the ceasefire agreement should be viewed as a compromise proposal put forward by Egypt and accepted by both sides. Israel continues to insist that Hamas must unilaterally meet three conditions before it will change its formal diplomatic stance. Those conditions are recognition of Israel's right to exist as a Jewish State, affirmation of past agreements between the Palestinian Authority and Israel and renunciation of violence.

13. To a certain extent, those recent facts speak for themselves: Hamas has emerged from that process producing a ceasefire and as a partner with Israel in the administration of joint arrangements. From the Israeli side, it is also plausible to view the arrangement as an implicit recognition by Hamas of the State of Israel. It is to be hoped that that development creates some prospect that the siege of Gaza will be lifted, international economic assistance restored and a regime of occupation established that complies with international humanitarian law and upholds human rights to the extent possible, given the security situation. Future assessments of that process will likely focus upon whether Egyptian negotiations with the Palestinian Authority for a reopening of the Rafah crossing are successful and whether a prisoner exchange agreement can be worked out that includes the release of the Israeli soldier Corporal Gilad Shalit, who has been held captive for more than two years. Encouragement of those negotiations is definitely correlated with the practical prospect of improving the protection of the economic and social rights of the 1.5 million Palestinians living in Gaza, although, from a strictly legal point of view, the obligations of Israel as occupying Power are unconditional, and not contingent, especially where the fundamental rights of the general Gazan population is concerned.

14. Although the volatile relations of Hamas and Fatah within the Occupied Palestinian Territory are not part of the current mandate, the recent call by President Mahmoud Abbas for talks leading to the establishment of a unity Government for all of Palestine moves also in the direction of reducing violence and allowing the civilian population living under Israeli occupation to have somewhat improved prospects that their human rights will be protected. A viable peace process depends, among other conditions, on achieving unified representation for all Palestinians living under occupation.

15. There have also been some encouraging developments in the region that might indirectly lead to improvements in the occupation regime, although, to date, the developments on the ground have not borne out those hopes. The negotiation of an agreement between Hizbullah and the Government of Lebanon offers some basis for greater stability. The ongoing negotiations between Israel and the Syrian Arab Republic, as mediated by Turkey, also suggest a renewed reliance on a diplomatic approach to unresolved conflicts, and some willingness by the State of Israel to

[5] For an early assessment of the ceasefire, see an article by Joshua Mitnick, "As Gaza ceasefire holds, Israel eases economic blockade", *Christian Science Monitor*, 23 June 2008.

consider withdrawing from territory occupied in the 1967 war. Egyptian initiatives with respect to the situation in Gaza are also part of that more constructive atmosphere in the neighbourhood of the Occupied Palestinian Territory, but so far, the occupied Palestinians have not experienced any benefits, and in many respects, the situation has continued to deteriorate.

16. The end to occupation is the only path to full restoration of the human rights of the Palestinian people. According to doctrine, international law requires an Israeli withdrawal from substantially all occupied Palestinian territory, including East Jerusalem, in accordance with the iconic call of Security Council resolution 242 (1967), which was adopted in the aftermath of the 1967 Arab-Israeli war. But withdrawal has been deemed extremely unlikely without bilateral negotiations that address, all issues in dispute between Israel and the Palestinian Authority. From that perspective, it had seemed somewhat optimistic to view the Annapolis conference of 27 November 2007 that brought together some 40 concerned Governments as a revival of the peace process along the lines set forth by the Quartet in its road map of 2003. At Annapolis, there was a joint understanding of the participating Governments that Israel and the Palestinian Authority would seek to resolve all outstanding issues, and there was an apparent shift by the Government of the United States towards an encouragement of bilateral negotiations. There have ensued frequent meetings between the Israeli Prime Minister, Ehud Olmert, and the President of the Palestinian Authority, Mahmoud Abbas, but no sign of notable breakthroughs on final status issues and little prospect that that negotiating track will produce meaningful results. That is a reflection of the weakness of Prime Minister Olmert in view of internal Israeli opposition, his embattled position and his announced plans to resign after the Kadima Party meetings in September 2008. More fundamentally, Israel has without doubt failed the litmus tests set up at Annapolis for a peace process that involved a complete freeze on Israeli settlement expansion (along with the dismantling of so-called outposts, that is, settler land occupations throughout the West Bank regarded as unlawful under Israeli law) and a reduction of checkpoint constraints on freedom of movement. The pattern since Annapolis is, instead, one of continuous Israeli settlement expansion at an accelerated pace, with no reports of outposts being dismantled, and an increase in the number of cumbersome restraints associated with Israel's network of military checkpoints.

17. The second litmus test set was the reduction of Palestinian violence. Here, the Gaza ceasefire, if it holds, seems extremely relevant, as does the resolve of the Palestinian Authority to implement to the best of its ability a policy of abandoning armed struggle against the Israeli occupation. But without comparable Israeli moves on settlements, the process is likely to be indefinitely stalled or abandoned. At present, there is no basis for optimism that the Annapolis initiative will lead to a timely end to the occupation, to peace or to respect by Israel for the rights of the Palestinian people according to the requirements of international humanitarian law and the legal standards of international human rights.

III. Significant human rights challenges: some case studies

A. Freedom of expression and harassment of media personnel: the case of Mohammed Omer

18. Mohammed Omer is a journalist who obtained an exit visa from Gaza, where he lives, to receive the Martha Gellhorn Prize for Journalism and to accept invitations to speak in Europe. His visa was issued after a considerable lobbying effort by a Dutch parliamentarian to persuade the Government of Israel to allow Mr. Omer to leave Gaza. The Gellhorn Prize for Journalism is given to a journalist who displays courage and ability in covering war zones, and Mr. Omer is the youngest recipient to be so honoured. On the basis of direct contact with Mr. Omer and a variety of distinguished persons to whom he is known, it is clear that Omer, a young man of 24, is widely admired for his personal qualities and his journalistic abilities, displayed in recent years in his reporting on the situation in Gaza. Mr. Omer's difficulties occurred on his return to Gaza, when he tried to pass through Israel from the Allenby Bridge crossing so as to enter Gaza. He reached the Jordanian border without the benefit of Dutch diplomatic escort, which arrived at the border late. According to Mr. Omer, the lack of a Dutch diplomatic escort left unfulfilled a commitment made to him when he was encouraged to leave Gaza to accept the award. The events in question took place on 26 June 2008, and have been reported in newspapers around the world. By private communication, the Special Rapporteur has been assured by the Dutch ambassador in Geneva that the incident is being taken "extremely seriously" and that an explanation is being sought from the Government of Israel. I have reinforced that request with an urgent appeal to the ambassador of Israel in Geneva. To date, no response has been received to either request for an account and explanation. Mohammed Omer has published his own version of the events, from which the following passage is taken:

> "Upon my return from London I was stripped naked at gunpoint, interrogated, kicked and beaten for more than four hours. At one point I fainted and then awakened to fingernails gouging at the flesh beneath my eyes. An officer crushed my neck beneath his boot and pressed my chest into the floor. Others took turns kicking and pinching me, laughing all the while. They dragged me by my feet, sweeping my head through my own vomit. I was told later they transferred me to a hospital ... Today I have difficulty breathing. I have abrasions and scratches on my chest and neck. My doctor informed me that due to nerve damage from one kick, I may be unable to father children and will need to have an operation."[6]

Mr. Omer is convinced that the brutal assault on his person was carried out by Shin Bet personnel who were fully aware that he had received the Gellhorn Prize while abroad, and were attempting to confiscate the award money, but were frustrated because it had been deposited in a bank account and was unavailable. After the experience at Allenby, Mr. Omer reportedly lost consciousness, was transferred to a Palestinian hospital in Jericho on the West Bank, and was then moved to the Erez crossing, from where he was again transferred for treatment to the European Hospital at Khan Younis refugee camp.

---

[6] Mohammed Omer, "Truth and Consequences Under the Israeli Occupation", *The Nation*, 31 July 2008.

19. The unfortunate incident described above cannot be discounted as an accident or an anomaly involving undisciplined Israeli security personnel. The treatment of Mr. Omer seems to have been motivated by Israeli anger over international recognition of his journalism describing the occupation of Gaza, his willingness to repeat his descriptions abroad and his dedication and intention to continue in the professional role of bearing witness to the excesses of the occupation. It should be noted that all Palestinians are subject to arbitrary harassment and abuse at borders and checkpoints, although the hostility towards journalists seems particularly severe. During his time in Europe, Mr. Omer spoke before European parliamentary audiences, describing the suffering in Gaza caused by the siege, closures and fuel and food shortages. It should be noted that Mr. Omer was not charged with any offence, nor was he carrying any prohibited materials. His treatment as described appears to constitute a flagrant violation of article 3(1)(a)(c) of the Fourth Geneva Convention, which reads, in part, "... The following acts are and shall remain prohibited at any time and in any place whatsoever ... (a) violence to life and person ... (c) outrages upon personal dignity, in particular humiliating and degrading treatment". Article 5 of the Universal Declaration of Human Rights is also relevant, as it proscribes "... cruel, inhumane or degrading treatment or punishment". More directly responsive to Mr. Omer's situation are article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights (1966). Article 19 (2) of the Covenant has been interpreted to apply in particular to journalists who strive to uphold rights "to receive and impart information of all kinds ... in writing or in print ... or through any media of his choice". Additionally, article 13 (2) of the Universal Declaration of Human Rights confirms the right of a person to return unimpeded to his or her country of residence. "Everyone has the right to leave any country, including his own, and to return to his country." That right was grossly violated in the case of Mr. Omer.

20. Although the incident affected only one individual, it inevitably has a chilling effect, and appears to be part of a broader pattern of Israeli punitive interference with independent journalistic reporting on the occupation. Amnesty International responded to the lethal shooting of a Reuters cameraman in April 2008 by an Israeli tank, saying, "Fadel Shana appears to have been killed deliberately although he was a civilian taking no part in attacks on Israel's forces". In August, the tank crew responsible for Mr. Shana's death was officially cleared of wrongdoing in a letter written by the Israeli Advocate-General, Brigadier General Avihai Mendelblit, prompting the Editor-in-Chief of Reuters, David Schlesinger, to respond, "I'm extremely disappointed that this report [by the Israeli military] condones a disproportionate use of deadly force in a situation that the army itself admitted has not been clearly analysed". There are other criticisms of abusive Israeli behaviour towards Palestinian and foreign journalists in Gaza and the West Bank issued by such respected organizations as Reporters Without Borders and the Committee to Protect Journalists. In sum, the experience of Mohammed Omer appears to be only the most recent example of a pattern of official Israeli conduct interfering with press freedoms under conditions of occupation, thereby depriving the Palestinian population of whatever protection might result from exposing abuses of authority by the occupying Power. The United Nations has a clear responsibility and definite obligation to protect independent journalism, especially in war zones and areas under occupation, as part of its commitment to human rights and international law.

B. Closures and Israeli Defense Forces military operations in the West Bank: abuses against the civilian population in Nablus

21. The continuing encirclement of the main West Bank cities through the extension of the separation wall and the maintenance of checkpoints mean that exit and entrance remain difficult and humiliating. Even the ongoing peace talks between Prime Minister Olmert and President Abbas, the stated commitment by the Government of Israel to reciprocate for the renunciation of armed resistance by the Palestinian Authority by easing restrictions on movement on the West Bank and the marked decline of Palestinian acts of violence in the West Bank and Gaza have not eased the ordeal facing Palestinians under occupation. Cities and towns where Hamas influence is believed to be strong, as evidenced by success at the municipal level in the 2006 elections, have been placed under particular pressure as a result of frequent military incursion. Nablus is a case in point. The Special Rapporteur has received reports under oath from non-Palestinian observers of the situation in Nablus. The reports prove that Israel has used force continuously against the civilian population of Nablus without even claiming justification on the basis of prior resistance activities. From 26 June until late July of 2008, the Israeli Defense Forces carried out a series of nightly military operations in Nablus that led to the killing of at least two young Palestinians, the arrest of dozens of men, women and children and the confiscation and destruction of property, and generated an atmosphere of fear. Those military actions have taken place without any explicit charges brought against the residents of Nablus. The damage included the destruction of property belonging to several charitable organizations, including schools, clinics and an orphanage that had been providing necessary services to the population in Nablus. Those institutions were arbitrarily closed, as was the Nablus Mall, which contained some of the city's oldest, most respected and prosperous commercial establishments. The property of important business entities was requisitioned by Israeli military authorities without due process or any credible security justification. The overall impact of those Israeli activities has been to reduce by some 50 per cent the economic activity of the city, which previously had been regarded as the commercial centre of Palestine. Beyond those material losses inflicted by recent occupation policies and the psychological harm caused by the terrifying experience of daily late-night military incursions by heavily armed Israeli forces, there is the growing sense of physical isolation produced by the numerous checkpoints and roadblocks that surround the city.

22. Closures of charitable and other civil institutions by the Israeli military have taken place in other cities throughout the West Bank in the last several months. They are illustrative of the deterioration of the conditions of occupation in that part of the Palestinian territory and of the occupying Power's two-tier violation of Palestinian human rights and of Israeli obligations under the Fourth Geneva Convention. That is, Israel is not only failing to fulfil its legal obligations as the occupying Power under international humanitarian law, but is also obstructing Palestinian efforts to mitigate the impact of those violations on the well-being of Palestinians enduring occupation. Because the situation in Gaza has been so extreme in the last year, with real fears of societal collapse, massive famine and widespread disease, there has been a comparative lack of attention to the hardships and suffering endured in the West Bank.

23. The United Nations has an independent obligation to protect the human rights of an occupied population, including ensuring that the rights of all sectors of the population are upheld, and not focusing only on those who face imminent humanitarian catastrophe. The occupation policies pursued by Israel are in violation of the spirit and the letter of international humanitarian law as set forth in articles 47 to 78 of the Fourth Geneva Convention. Article 53 is particularly relevant, requiring an occupying Power to refrain from destroying property of the occupied population unless "such destruction is rendered absolutely necessary by military operation". The effect of the military closure operations was to destroy property belonging to the residents of Nablus. Articles 64 to 69 provide a legal framework for holding persons in the occupied territory criminally responsible for their alleged wrongdoing, if any, but the Convention unconditionally prohibits extrajudicial killing, reprisals and all forms of collective and punitive violence. Noted Israeli journalist Gideon Levy, writing in *Ha'aretz* on 20 July 2008, observed that West Bank Palestinian civilians "cannot be simultaneously imprisoned, prohibited from earning a living and offered no social welfare assistance while we strike at those who are trying to do so, whatever their motives. If Israel wants to fight the charitable associations, it must at least offer alternate services. On whose back are we fighting terror? Widows? Orphans? It's shameful." The moving report prepared by Mairead Maguire, Nobel Peace Prize laureate from Northern Ireland, addressing the closing of the Hebron orphanages, expresses similar views.[7]

C. Right to peaceful assembly: demonstrations against the wall in the West Bank

24. Ni'lin is a village situated in the Ramallah district of the West Bank near the wall that Israel has been unlawfully constructing on Occupied Palestinian Territory in defiance of the July 2004 advisory opinion of the International Court of Justice. It has been the scene of numerous non-violent demonstrations against the construction of the wall that was built in such a way as to confiscate significant portions of the land belonging to the village. That is part of a longer story of land dispossession that has afflicted the Palestinians.

25. It is estimated that as much as 80 per cent of the land belonging to Ni'lin has been incrementally confiscated by Israel, starting in 1948. After the 1967 war, the location of Ni'lin near the Green Line led to further land confiscations on behalf of West Bank settlements (74 dunams for the settlement of Shalit, then 661 dunams for Mattityahu, 934 dunams for Hashmonaim, 274 dunams for Mod'in Illit, 20 dunams for Menora), which took about 13 per cent of the village land. When a further 20 per cent of Ni'lin land, belonging to its residents, was officially slated for confiscation by Israel for the construction of the wall, strong demonstrations took place. Ni'lin became the inspirational centre of opposition to the wall and, during 2003-2004, it was the scene of numerous anti-wall demonstrations. In recent months, there have been protests by people living in the village and supporters from neighbouring cities such as Ramallah and Tulkarem, and also by Israeli peace activists who have come to Ni'lin to join in the non-violent demonstrations seeking to prevent the resumption of construction of the wall.

[7] Report on destruction of Muslim charitable institutions in Hebron by Israel, 5 June 2008.

26. Israeli military forces, including border police, have used a variety of violent means to disperse the demonstrators, including rubber-coated steel bullets and live ammunition. Two young Palestinians have died from gunshot wounds. Ahmed Mousa, a 10-year-old boy photographed at the demonstration, was killed, according to witnesses, as he was leaving the demonstration. A widely respected Israeli participant in the demonstrations, Uri Avnery, a former member of the Knesset, wrote in an article for the Ma'an News Agency, dated 3 August 2008, "A soldier aimed and shot the child with live ammunition at close range". Those who saw the boy described his face as "shot off". Mustafa Barghouti, a prominent Palestinian parliamentarian, was quoted as saying "Israel is trying to provoke peaceful demonstrators into using violence". A few days later, a second Palestinian, 19-year-old Yousef Akmada Omaira, also died from head wounds received while taking part in the funeral of Ahmed Mousa.

27. From the perspective of international human rights law, the residents of Ni'lin were entitled to demonstrate peacefully against a clearly unlawful extension of the occupation associated with the construction of the wall on occupied Palestinian land that was proceeding in defiance of the advisory opinion if the International Court of Justice and its overwhelming endorsement by the General Assembly.[8] In addition, the Israeli use of excessive force, especially when it appears to deliberately seek to kill or maim demonstrators, including children, nullifies any claim that the police and military actions taken were necessary for purposes of security and public order. It is a basic right of people to defend their land against its unlawful seizure, and that right pertains in circumstances of occupation where there exists a legal regime in the form of the Fourth Geneva Convention deliberately designed to preserve the character of the occupied territory and uphold the interests of its citizens. In response to Palestinian legal initiatives, Israeli authorities have relocated segments of the wall to limit interference with Palestinian agricultural activity in Nil'in and Qalqilia.

IV. Settlements in the Palestinian territories and their impact on the enjoyment of human rights

28. The continued expansion of unlawful Israeli settlements on the West Bank and in Jerusalem constitutes a serious pattern of unlawful conduct on the part of the occupying Power and a disregard of Israel's own international undertakings to freeze settlement growth and remove "outposts" on the West Bank established without proper Israeli authorization. Additionally, the extent and scope of the Israeli settlement programme, including the creation of security arrangements and bypass roads, tunnels and bridges, is a decisive impediment to the establishment of peace between Israel and Palestine, as well as a source of daily friction under conditions of occupation. The unlawfulness of settlements anywhere in the Occupied Palestinian Territory, including East Jerusalem, has long been established by a consensus of international law specialists, and confirmed by resolutions of the

[8] *Legal Consequences of a Wall in the Occupied Palestinian Territory*, International Court of Justice advisory opinion, 9 July 2004; General Assembly resolution ES-10/15 called upon the parties to comply with the obligations as set forth in the advisory opinion. Israel has rejected the authority of the advisory opinion, and has proceeded with the construction of further segments of the wall.

General Assembly and the Security Council. That conclusion is most clearly supported by article 49 of the Fourth Geneva Convention, which prohibits the occupying Power from transferring "parts of its own civilian population into the territory it occupies".

29. Unfortunately, the diplomatic situation bearing on the settlements was clouded by an exchange of official letters between Ariel Sharon, then Prime Minister of Israel, and George W. Bush, President of the United States of America, on 14 April 2004. The letters were widely interpreted as signalling an American acceptance of the permanent annexation by Israel of the large Israeli settlements near the 1967 borders, 80 per cent of the total settler population, as well as in the occupied portions of Jerusalem. It should be noted that while such letters may have political weight for the two Governments, they carry no legal weight, and can certainly not compromise Palestinian rights under international humanitarian law. In that basic sense, the letters are irrelevant to any legitimate peace process, and United Nations participation should reflect an understanding of the inability of the letters to impinge upon Palestinian rights.

30. It is significant that even discounting the legal importance or moral weight of these letters, an Israeli undertaking on the settlements was set forth in Prime Minister Sharon's letter, but it had no discernible effects on behaviour. Sharon indicated an awareness of "the responsibilities facing the State of Israel". Among them are "limitations on the growth of settlements; removal of unauthorized outposts". Those responsibilities were reaffirmed by the current Israeli Government at Annapolis, but, again, have not been implemented to the slightest degree. To the contrary, settlement growth as measured by population, but even more so, by land acquisition, mainly by expropriation and seizure, and development has continued at an accelerated pace.

31. That pattern, and the resulting cantonization of Palestinian daily life, is increasingly seen as sending a message to the Palestinians that the two-State solution to the conflict is no longer viable, despite the fact that it remains the stated policy of the Quartet, the Annapolis Understanding and most commentary on the goals of the peace process. Among the disquieting aspects of the letter of President Bush is its support for shaping Israel's eventual withdrawal obligations "In light of new realities on the ground, including major Israeli population centres." There is no mention of the constant reminders to the Government of Israel that its settlement policy is incompatible with its obligations under international humanitarian law and with specific United Nations resolutions.

32. The extent of the settlement encroachment on West Bank and East Jerusalem territory is difficult to calculate with precision owing to the continuous process of expansion. The prevailing best estimate is that settlement land claims (together with Palestinian land seized for the construction of the separation wall) have led to the confiscation of 14 per cent of the territory of the West Bank, which itself represents only 22 per cent of the original British Mandate of Palestine. According to recent figures, there are currently some 200 settlements, 100 outposts and 29 Israeli military bases. The cost of sustaining the settlement network is about $556 million per year, and the number of settlers is estimated to be between 480,000 and 550,000. The rate of settlement expansion is placed at approximately 4 per cent per year, both with respect to land and population. There are a variety of special problems raised by the settlements that contribute to violence, both the violence of settlers towards

Palestinians, and the violence of Palestinian resistance. The city of Hebron has been a persistent flashpoint and the scene of repeated violent incidents and tragic deaths, where 700 settlers are protected by 300 Israeli soldiers in a city of 150,000 Palestinian inhabitants. Perhaps, the most telling statistic (compiled by the United Nations Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory) is that Palestinian land taken by Israel for settlements, for closed military zones (including almost the entire Jordan Valley), and for Israeli-declared nature preserves now renders 40 per cent of the West Bank inaccessible and unusable for residential, agricultural, commercial or municipal development.

33. The expansion of settlements has been particularly notable in East Jerusalem. The Jerusalem District Planning and Construction Committee recently approved 1,800 new housing units (920 in Har Homa/Jabal Abu Ghneim, 880 in Pisgat Ze'ev). The expansion also furthers the Israeli policy of making East Jerusalem into a place of majority Jewish residence, and is accompanied by expulsions of Palestinians. In addition, the presence of 250,000 Jews living "illegally" in East Jerusalem is being overlooked.

V. Health crisis in the Palestinian territories

34. There is a consensus among specialized observers that a persistent health crisis exists in both Gaza and the West Bank. It is multidimensional, and there is a serious risk of a complete collapse of the basic health system, with disastrous consequences for the Palestinian population.

35. The basic economic and social situation in the Occupied Palestinian Territory is characterized by extremely high unemployment and poverty rates, especially in Gaza. According to both United Nations and World Bank sources, the poverty rate for the West Bank and Gaza combined is currently 59 per cent, and food insecurity affects at least 38 per cent of the overall population of the Occupied Palestinian Territory. The unemployment level in Gaza is officially listed at 45 per cent, the highest in the world, but even that figure understates the true level for a variety of reasons. It is reported that 95 per cent of the factories in Gaza are now closed owing to the siege. The World Bank has suggested that that set of conditions could produce an "irreversible" economic collapse.

36. Israel has classified Gaza as an "enemy entity" since Hamas took over in mid-June 2007, and has justified restricting food and fuel provision to levels sufficient to sustain bare survival. According to available statistics, Gaza is receiving only 30 per cent of its fuel needs per week, and, in particular, receives insufficient quantities of cooking oil and diesel fuel. The designation of "enemy state" has also led Israel to block payment of customs revenue that belongs to the Palestinians, and both Europe and the United States of America suspended their economic assistance to Gaza.

37. Medical supplies and essential equipment are often not available owing to an inability to import spare parts or obtain replacements. Ill Gazans in need of specialized medical attention not available in Gaza have great difficulty acquiring exit permits to obtain treatment in Israel, and many have died because they did not receive timely medical attention. The obstacles confronting ill Palestinians in Gaza needing treatment in Israel are discussed in paragraph 46. According to the Gaza Community Mental Health Programme, the cumulative effect of those conditions has had "serious mental consequences [for] the Palestinian people, [with the]

majority of civilians ... suffering from feelings of anger, anxiety, panic, depression, frustration and hopelessness as a result of Israeli occupation practices, [the] siege and poverty".

38. The situation in the West Bank is less dramatically bad as far as conditions of health are concerned, but is still far below minimum international standards. Unemployment is at 25 per cent, even with economic assistance flowing to the Palestinian Authority, but closures and cantonization make it difficult and often impossible to sustain gainful economic activity. A basic difficulty is associated with the combination of checkpoints, roadblocks and permit requirements that impede movement to and from medical facilities even within the West Bank, especially from villages and refugee camps surrounding the larger towns and cities where hospitals and other medical facilities are located. The restrictions also make access to Israel very difficult, and often impossible, for most Palestinians living in the West Bank. It is widely reported that those conditions are causing a variety of ailments, especially in children suffering from malnutrition and trauma.

39. The Government of Israel denies any responsibility as the occupying Power for the severe substandard health conditions. With respect to Gaza, it claims that as of 12 September 2005 it is no longer the occupying Power as discussed in paragraph 5, and thus is no longer legally accountable for any adverse consequences experienced by the inhabitants of Gaza. Israel also argues that since the Hamas takeover, it has pursued a counter-terrorist policy towards Gaza that bears a resemblance to war, as in "the war on terror". From the perspective of international law, Israel remains the occupying Power, and hence is subject to the Fourth Geneva Convention, which in articles 13 to 25 emphasizes in detail the legal duty of the occupying Power to ensure the health of the population subject to occupation.

40. That set of obligations has particular relevance to the Occupied Palestinian Territory in view of the prolonged nature of the occupation, and, with respect to Gaza, the additional acute impact of Israeli policies that adversely affect the health and well-being of the entire Gazan population. Article 16, for instance, reads as follows: "The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect". That obligation is reinforced by article 25 (1) of the Universal Declaration of Human Rights, which declares: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

41. Perhaps the clearest articulation in international law of the right to health is to be found in article 12 (1) of the International Covenant on Economic, Social and Cultural Rights, which reads, in part, "The States parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Article 12 (2) (b) and (d) are also relevant, reading, in part, "The steps to be taken by the States parties to the present Covenant to achieve full realization of this right shall include those necessary for: (b) The improvement of all aspects of environmental and industrial hygiene; ... (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness".

42. Israel is a party to that treaty instrument, and is bound by the basic standards it affirms, which are in any event expressive of legal obligations embodied in customary international law. Overall, the obligations of international humanitarian law and of human rights standards are especially applicable in conditions of a fiduciary role as it is exercised by an occupying Power towards a captive population.

43. The whole approach taken towards Gaza by Israel and by the United States of America and the European Union, since the Hamas electoral victory in January 2006, involves a massive and unlawful systematic violation of article 33 of the Fourth Geneva Convention, which unconditionally prohibits collective punishment: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited". More practically, medical specialists continually warn that the health system in Gaza is precarious, often described as being on "the verge of collapse" or "unsustainable".

44. The experience of the West Bank, despite the absence of a systematic siege or the denial of funds needed to sustain health care, bears many resemblances to the situation in Gaza, although Israel makes no claim that it is not still the occupying Power in the West Bank. In the West Bank, the policies of the Government of Israel which punish the Palestinian population as a whole are routinely justified as necessary for the security of the occupation, including the settlements, and for Israel itself. Those security claims themselves, whatever their validity when independently asserted, have to be weighed in context against the harm caused to the occupied people. That was done by the International Court of Justice in relation to the wall (see para. 3), and the Israeli claim was rejected, especially as Israel had constructed the wall in Occupied Palestinian Territory and used the land confiscated for expansion of settlements, itself an unlawful purpose completely unrelated to legitimate security claims. Mental health treatment and access to medical facilities, especially in the face of health emergencies, have been particularly impeded by the ubiquitous restrictions on movement throughout the West Bank as a result of checkpoints, roadblocks and closures. Such restrictions seem excessive, and have been frequently observed, combined with a variety of intimidating and humiliating practices which discourage Palestinian movement in the West Bank. Over time, the situation is causing serious damage to the health of inhabitants. The regime of confinement amounts to collective punishment, and violates article 13 (1) of the Universal Declaration of Human Rights, which states, "Everyone has the right to freedom of movement and residence within the borders of each State".

45. In sum, the forms that the occupation has taken in Gaza and the West Bank have put severe strains on the maintenance of the physical and mental health of Palestinians living under occupation. The harmful effects have been particularly severe for children. It is notable that, given the length of the occupation, the overwhelming majority of Palestinians in Gaza and the West Bank have spent their entire lives under occupation. At a conference held in East Jerusalem, the Special Rapporteur was particularly struck by the comment of a West Bank professor who teaches at Bir Zeit University who said, "I am 43 years old, and I have not had a happy day in my entire life". In that respect, beyond statistics, the oppressiveness of a sustained and relentless military occupation is not consistent with maintaining basic mental and physical health.

A. Further infringements affecting medical patients from Gaza: Shin Bet interrogation of Palestinian medical patients at the Erez crossing

46. Physicians for Human Rights-Israel issued a report on 4 August 2008 that contains the testimony of 32 Gazan medical patients who were interrogated at the Erez crossing. The report is based on information received since July 2007. The individuals were seeking entry to Israel to receive urgent medical treatment unavailable in Gaza for serious, often life-threatening conditions, and claimed to have been subject to harsh and improper questioning in intimidating circumstances by members of the Israeli General Security Service (Shin Bet). The testimonies exhibit a consistent Israeli insistence that the individual seeking an exit permit would have to wait indefinitely unless he or she agreed to supply the General Security Service with requested information and/or collaborate in the future with the Security Service. The report also states that a number of Gazans decided to forego medical treatment rather than endure interrogation, despite the likely disastrous health consequences of such a decision. One person said, "Afterwards, the interrogator told me, 'you are sick with cancer and soon it will spread to your brain. As long as you do not help us — [you will] wait for [the opening of] Rafah crossing'". The remark was typical of the testimony gathered for the report.

47. The Government of Israel has responded to the allegations contained in the report of Physicians for Human Rights-Israel, contending that its behaviour is within its sovereign rights, and is reasonable given the dangerous security conditions, such as Hamas attacks directed at the Erez crossing, where the interrogations take place. The main Israeli claims are that it no longer has any responsibility for what takes place in Gaza, as it ceased being the occupying Power on 12 September 2005, that it has complete discretion to deny Gazans access to Israel on any ground whatsoever and that that conclusion has been supported by Israeli judicial authorities.

48. For purposes of international humanitarian law, the Gaza Strip continues to be under Israeli occupation (see para. 5). Accordingly, although not explicitly responsive to the situation under review, articles 55 and 56 of the Fourth Geneva Convention impose on an occupying Power a general legal duty to take all necessary measures to safeguard the health of persons being protected.

49. Depending on how the attempted extortion of information and collaboration in exchange for exit permits to receive medical treatment is viewed, it would appear to be in violation at least of article 3 (1) (c), which prohibits "cruel treatment and torture", as does article 5 of the Universal Declaration of Human Rights. Perhaps the most relevant legal text is the United Nations Convention against Torture, which lays out a broad set of requirements to avoid an inference of "torture or other cruel, inhuman or degrading treatment". Article 1 connects torture and related treatment to behaviour by a public official that can be either "physical or mental" in the course of interrogation that seeks information by a variety of forms of intimidation; other provisions of the Convention against Torture impose a variety of legal duties on the State, and confer rights on aggrieved individuals.

50. The Special Rapporteur concludes that Israeli interrogation practices as reported by Physicians for Human Rights-Israel on the basis of Gazan testimonies strongly suggest violations of Israel's legal responsibilities as occupying Power. The Israeli responses are not satisfactory because they rest on the premise that Gaza is

no longer occupied. Additional disturbing news indicates that six seriously ill Gazans died in one 24-hour period while they were awaiting permission to travel. According to the Free Gaza Movement, 233 severely ill Gazan patients have died while delayed in their attempts to leave Gaza for necessary medical treatment during the period of the siege.

VI. Recommendations

51. The following recommendations drawn from the body of the report are emphasized as matters of urgency:

(a) **The General Assembly should ask the International Court of Justice for a legal assessment of the Israeli occupation of Palestine territory from the perspective of the Palestinian right of self-determination;**

(b) **The assistance of the Security Council should be sought in the implementation of the 2004 advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*;**

(c) **In the light of persisting gross violations of the Geneva Conventions over a long period of time, serious consideration should be given to the legal obligations of the parties to these treaties "to ensure respect" for the substantive undertakings as called for in common article 1. An initial step might be to urge the Government of Switzerland, as repository for the Geneva Conventions, to convene a meeting of States parties with the purpose of exploring how to carry out their legal duties, given the persistent and severe violation of the legal regime of occupation by Israel;**

(d) **Serious note should be taken by all relevant agencies of the United Nations of the failure of Israel to fulfil its pledges at the Annapolis summit to halt settlement expansion, to ease freedom of movement on the West Bank and to attend to the humanitarian needs of the Palestinians under occupation;**

(e) **The United Nations should explore its own responsibility with respect to the well-being of the Palestinians living under unlawful conditions of occupation, particularly bearing on abuses of border control, freedom and independence of journalists, and the general crisis in health care, especially in Gaza;**

(f) **In view of the health crisis in Gaza, members of the international community, including the United Nations, should resume economic assistance as a matter of the highest priority. In the face of an impending humanitarian catastrophe, the responsibility to do what is possible to mitigate human suffering is serious. It is a responsibility towards the civilian population of Gaza, and is not dependent on whether Hamas satisfies the political conditions set by Israel, nor is it dependent on whether the ceasefire holds.**